REGINA v OLUGBOJA

COURT OF APPEAL (CRIMINAL DIVISION)
[1982] QB 320, [1981] 3 All ER 443, [1981] 3 WLR 585

17 June 1981

INTRODUCTION:

The defendant, Stephen Olubunmi Olubgoja, was convicted at Oxford Crown Court on one count of rape and was sentenced by Judge Leo Clark to 2 1/2 years' imprisonment. He applied for leave to appeal against conviction on the grounds, inter alia, that the jury should have been directed as to the meaning in law of "lack of consent" and told that there could only be an absence of consent if the victim's mind had been overborne by fear of death or duress; and that the jury had been misdirected by the indication that the question of consent was a matter of fact for them to decide. He also applied for leave to appeal against sentence.

The hearing of the application was treated by the court as the hearing of the appeal.

The facts are stated in the judgment of the court.

PANEL: Dunn L.J., Milmo and May JJ.

DUNN L.J. read the following judgment of the court. In this case we grant leave to appeal against conviction and we treat the hearing of the application as the hearing of the appeal.

The question of law raised by this appeal is whether to constitute the offence of rape it is necessary for the consent of the victim of sexual intercourse to be vitiated by force, the fear of force, or fraud; or whether it is sufficient to prove that in fact the victim did not consent.

The offence of rape was defined for the first time by statute in 1976. Section 1 (1) of the Sexual Offences (Amendment) Act 1976 amended section 1 of the Sexual Offences Act 1956 by providing:

"For the purposes of section 1 of the Sexual Offences Act 1956 (which relates to rape) a man commits rape if -- (a) he has unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it; and (b) at that time he knows that she does not consent to the intercourse or he is reckless as to whether she consents to it; and references to rape in other enactments (including the following provisions of this Act) shall be construed accordingly."

In this appeal it is not disputed that the defendant had sexual intercourse with Jayne. The only questions for the jury were whether she had consented; and if she had not, whether the defendant knew

she had not or was reckless as to whether she consented or not. In this appeal we are only concerned with the actus reus and not with the mens rea of the defendant.

The defendant, who is a Nigerian, aged 20 at the time and studying at Oxford, had sexual intercourse with Jayne, then aged 16, on March 8, 1979, at the bungalow of his co-accused Lawal. She had been taken there with her friend Karen (aged 17) and Lawal in a car driven by the defendant from a discotheque in Oxford where they had all been dancing. Lawal had offered the girls a lift home, but the defendant had driven them to the bungalow which was virtually in the opposite direction from where they lived. This was a deliberate trick to get them to the bungalow. When they got there both girls refused to go in, and started walking away. They did not know where they were. Lawal followed them in the car, and after some argument they got in. After a further argument Karen again got out, and, as she was trying to get Jayne out, Lawal drove off, stopped in a lane, and raped Jayne.

Lawal then drove back to the bungalow, picking Karen up on the way, and the three of them went inside. The defendant was there lying on the sofa asleep, and saw them arrive. Jayne was the last to come in. She was either crying, or obviously had been. Music was put on. Jayne declined to dance. She went to the lavatory and returned to find Lawal dragging Karen into the bedroom. The defendant switched the sittingroom lights off and told Jayne that he was going to fuck her. She told him that Lawal had had her in the car and asked why could the defendant not leave her alone. He told her to take her trousers off and she did because she said she was frightened. She was still crying and the room was in darkness. The defendant pushed her on the settee and had intercourse with her. It did not last long. She did not struggle; she made no resistance; she did not scream or cry for help. She did struggle when she thought after penetration that the defendant was going to ejaculate inside her, and he withdrew. She put her clothes on and the other two emerged from the bedroom, where Lawal had raped Karen. The defendant and Jayne then went into the bedroom. She told him she was going to call the police. He said that if she opened her big mouth he would not take her home. He later did.

Once home Jayne made a complaint to her mother about Lawal but not about the defendant. She said later she did not know why she did not complain to her mother about the defendant. She supposed that she was more upset "about the first one," meaning Lawal. After she had made her complaint to her mother about Lawal she saw the police and a doctor, with whom she spent a total of eight hours. She made no complaint against the defendant; indeed she said he had not touched her.

The police initially saw the defendant as a witness to the complaints by both Jayne and Karen with regard to the rapes on each of them by Lawal. In the course of the interview the police said to the defendant that Lawal had said that he, the defendant, had had sexual intercourse with Jayne. When they put that to him, Jayne had made no complaint against him. The defendant at once admitted he had had sexual intercourse with Jayne and in answer to the question: "Did she consent?" he replied: "Well not at first but I persuaded her." At the end of the interview the defendant made a written statement. The police then saw Jayne who said that the defendant had indeed had intercourse with her against her will. The police then went back to see the defendant and put to him what Jayne had said. There

followed a further long and detailed interview.

At the trial a submission was made at the conclusion of the case for the Crown on behalf of the defendant that there was no case to answer. The judge ruled that the case should go to the jury. The defendant did not give evidence, and relied on his statement to the police as constituting his defence.

The judge dealt with the question of consent in his summing-up in a number of passages. He said:

"The question of consent is a question of fact for you to decide, approaching it in a commonsense way. You are concerned, are you not, with the field of human sexual behaviour and in particular in this case, teenage sexual behaviour? You have to consider it in a commonsense way applying your own experience or knowledge of human nature and your knowledge of the ways of the world.... Sometimes a woman gives in and submits out of fear, or constraint, or duress."

These directions were quite general in relation to both girls. In relation to Jayne the judge said:

"You will consider her evidence very carefully and decide whether or not there were any constraints operating on her will, so that you are satisfied that in taking her trousers down, and letting him have sexual intercourse with her, she was not, in fact, consenting to it."

Later, the judge said:

"Members of the jury, you are concerned with what was the reason? Was it circumstances in which she was consenting, or was it circumstances in which there was constraint operating on her mind, fear or constraint, so that in doing that, she was doing it without her consent."
Finally, the judge said:

"Let me remind you finally that the defense point out that it is not a case where the girl was struggling or screaming. Unless what was said about intercourse and then going home contained any implied threat in it, no threats were uttered; certainly no threats of force or violence, or anything of that sort. The defence say this girl removed her own trousers and that was in itself an open invitation to sex. That of course depends on why and in what circumstances she removed her trousers. Was it because she was consenting, or was it because she was giving in out of fear or constraint, so that she was removing her own trousers without consent? It is a matter for you to decide."

The defendant was convicted of rape by a majority of 11-1 and sentenced to 30 months' imprisonment.

Mrs. Trewella [counsel for the defendant], in a series of very able submissions, said that these statements by the judge constituted a misdirection. She submitted that the statutory definition of rape introduced by the 1976 amendment into section 1 of the Sexual Offences Act 1956 was declaratory

only, and had not changed the common law whereby the type of threat that vitiates consent is limited to threats of violence either to the victim or, as in duress, to some close or near relative.

* * *

The definition of rape imported into the Act of 1956 by the amending Act of 1976 makes no mention of force, fear or fraud. It simply defines rape as being unlawful sexual intercourse with a woman who at the time of the intercourse does not consent to it. The Act of 1976 by its short title is described as "An Act to amend the law relating to rape." Is it a true amending Act or is it merely declaratory of the common law? To answer that question it is necessary to look at the history of the legislation.

Reg. v. Morgan [1976] A.C. 182 stated the law of rape as it then stood. Their Lordships were primarily concerned with the necessary mens rea of the offence. They were not concerned with, nor did they consider, the actus reus. But there is a passage in the speech of Lord Hailsham of St. Marylebone, at p. 210, which appears to indicate that Lord Hailsham was accepting the common law definition of rape, that is to say sexual intercourse by force, fear or fraud.

Following the decision in Reg. v. Morgan an advisory group on the law of rape was set up under Heilbron J. The group reported to the Home Secretary on November 14, 1975 (Report of the Advisory Group on the Law of Rape) (1975) (Cmnd. 6352). Like the House of Lords in Reg. v. Morgan they were principally concerned in the material part of the report with the mens rea of the offence. However, in a section headed "The Crime of Rape" there appear the following paragraphs:

> "18. There is no modern definition of the crime of rape and although it is an offence under section 1 of the Sexual Offences Act 1956, the statute contains no attempt at a definition. The traditional common law definition, derived from a 17th century writer and still in use, is that rape consists in having unlawful sexual intercourse with a woman without her consent, by force, fear or fraud.
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> "19. This definition can be misleading, since the essence of the crime consists in having sexual intercourse with a woman without her consent and it is, therefore, rape to have intercourse with a woman who is asleep or with one who unwillingly submits without a struggle.
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> "20. As Smith and Hogan point out in their text book on the Criminal Law: 'Earlier authorities emphasised the use of force; but it is now clear that lack of consent is the crux of the matter and this may exist though no force is used. The test is not "was the act against her will?" but "was it without her consent?"
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> "21. It is, therefore, wrong to assume that the woman must show signs of injury or that she must always physically resist before there can be a conviction for rape. We have

found this erroneous assumption held by some and therefore hope that our recommendations will go some way to dispel it.

"22. The actus reus in rape, which the prosecution must establish for a conviction consists of (a) unlawful sexual intercourse and (b) absence of the woman's consent.

"84. Finally, as rape is a crime which is still without a statutory definition, the lack of which has caused certain difficulties, we think that this legislation should contain a comprehensive definition of the offence which would emphasise that lack of consent (and not violence) is the crux of the matter."

That paragraph was incorporated into a recommendation for what was described as "declaratory legislation."

* * *

We have not been persuaded by Mrs. Trewella that the position at common law before 1976 was different from that stated in the Report of the Advisory Group, but whatever it may have been we think that Parliament must have accepted the group's recommendation in paragraph 84 of their report and incorporated it in the Act of 1976. Accordingly in so far as the actus reus is concerned the question now is simply: "At the time of the sexual intercourse did the woman consent to it?" It is not necessary for the prosecution to prove that what might otherwise appear to have been consent was in reality merely submission induced by force, fear or fraud, although one or more of these factors will no doubt be present in the majority of cases of rape.

We do not agree, as was suggested by Mrs. Trewella, that once this is fully realised there will be a large increase in prosecutions for rape. Nor, on the other hand, do we agree with Mr. Brent's submission, on behalf of the Crown, that it is sufficient for a trial judge merely to leave the issue of consent to a jury in a similar way to that in which the issue of dishonesty is left in trials for offences under the Theft Act 1968. In such cases it is sufficient to direct the jury that "dishonest" is an easily understood English word and it is for them to say whether a particular transaction is properly so described or not. Although "consent" is an equally common word it covers a wide range of states of mind in the context of intercourse between a man and a woman, ranging from actual desire on the one hand to reluctant acquiescence on the other. We do not think that the issue of consent should be left to a jury without some further direction. What this should be will depend on the circumstances of each case. The jury will have been reminded of the burden and standard of proof required to establish each ingredient, including lack of consent, of the offence. They should be directed that consent, or the absence of it, is to be given its ordinary meaning and if need be, by way of example, that there is a difference between consent and submission; every consent involves a submission, but it by no means follows that a mere submission involves consent: per Coleridge J. in Reg. v. Day, 9 C. & P. 722, 724. . . . They should be directed to concentrate on the state of mind of the victim immediately before the act

of sexual intercourse, having regard to all the relevant circumstances; and in particular, the events leading up to the act and her reaction to them showing their impact on her mind. Apparent acquiescence after penetration does not necessarily involve consent, which must have occurred before the act takes place. In addition to the general direction about consent which we have outlined, the jury will probably be helped in such cases by being reminded that in this context consent does comprehend the wide spectrum of states of mind to which we earlier referred, and that the dividing line in such circumstances between real consent on the one hand and mere submission on the other may not be easy to draw. Where it is to be drawn in a given case is for the jury to decide, applying their combined good sense, experience and knowledge of human nature and modern behaviour to all the relevant facts of that case.

Looked at in this way we find no misdirection by the judge in this case.

DISPOSITION:

Appeal dismissed.